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December 18, 2003

The Honorable Jeffrey W. Runge, M.D.
Administrator
National Highway Traffic Safety Administration
400 Seventh Street, S.W.
Washington, D.C. 20590

Dear Dr. Runge:

RE: Confidential Business Information (67 Fed. Reg. 21198, April 30, 2002)
Docket No. NHTSA 2002 – 12150 -36

The Alliance of Automobile Manufacturers (Alliance), whose members are BMW Group, DaimlerChrysler, Fiat, Ford Motor Company, General Motors, Isuzu, Mazda, Mitsubishi Motors, Nissan, Porsche, Toyota, and Volkswagen, submits the following supplemental comments regarding the procedures and substantive standards for protecting confidential business information now contained in Part 512 of the agency's regulations. These comments are intended to briefly respond to comments recently docketed in this proceeding that were filed by Public Citizen and correct the record with respect to Public Citizen's gross mischaracterization of the Alliance views on this proposal.[1]

Public Citizen accuses the Alliance of attempting to "override the clear intent of Congress in passing the early warning law" with respect to public availability of the early warning submissions that will be provided to the agency beginning in 2003, apparently because the Alliance supported the creation of class determinations of presumptively confidential information contained within the "early warning" submissions. In fact, however, the text and structure of the TREAD Act strongly support the Alliance position that Congress presumed that at least some of the information submitted as "early warning" information would be entitled to protection as confidential business information under Exemption Four of the Freedom of Information Act.

[1] Given the long period of time that has passed since the closing of the comment period on July 1, 2002, it would be understandable if the agency decided that it was not practicable to consider Public Citizen's comments in preparing the final rule. If the agency reached such a conclusion, then it would be reasonable likewise to decline to consider these supplemental comments to the extent that they respond to Public Citizen's comments. If, however, the agency decides to consider the Public Citizen comments, the Alliance requests that these supplemental responsive comments also be considered.

It may surprise Public Citizen to recognize how many of its positions on this proposed rule were first advanced ***by the Alliance*** in its July 1, 2002 comments.

- The Alliance noted that information submitted to NHTSA is not even considered for release under Section 30167(b) of the Vehicle Safety Act unless and until that information is already entitled to confidential treatment under FOIA. Alliance Comments at p. 3. ***So did Public Citizen.*** PC Comments at p. 8.

- The Alliance concluded that the most natural reading of Section 30166(m)(4)(C) as added by TREAD to the Vehicle Safety Act was that it was intended to neutralize, or reverse, the presumption in favor of disclosure contained in Section 30167(b). Alliance Comments at p. 3. ***So did Public Citizen.*** PC Comments at p.9.

- The Alliance encouraged NHTSA to follow the policy guidance of Attorney General Ashcroft regarding FOIA administration. Alliance Comments at p. 4. ***So did Public Citizen.*** PC Comments at p. 11.

- The Alliance told NHTSA that the proper standard for evaluating the eligibility of "early warning" submissions should be the traditional "competitive harm" test under Exemption Four of the FOIA, as construed by *National Parks*. Alliance Comments at p. 5. ***So did Public Citizen.*** PC Comments at 12.

- The Alliance urged reliance on the existing agency practice of identifying "classes" of information that are presumptively entitled to protection as confidential business information. Alliance Comments at pp. 5-11. ***So did Public Citizen.*** PC Comments at 7.

- The Alliance specifically supported the creation of "additional class determinations under FOIA [as] the proper mechanism" for addressing documents entitled to classification as confidential business information. Alliance Comments at 8. ***So did Public Citizen.*** PC Comments at 12.

Given this confluence of views between the Alliance and Public Citizen on many, major issues regarding the proper standard for protection of confidential business information submitted to NHTSA under the "early warning" provisions of the TREAD Act, the tone of the Public Citizen comments is surprisingly hostile, especially regarding the positions actually asserted by the Alliance. It raises the question as to whether Public Citizen has conflated the positions taken by other trade associations with those taken by the Alliance. For example, contrary to Public Citizen's assertion, the Alliance did ***not*** argue that the TREAD Act works "wholesale alterations in the agency's implementation of its obligations under FOIA". Comments at p. 9. Instead, the Alliance based its arguments in favor of certain class determinations soundly in the extensive law supporting the protection of confidential business information under Exemption Four of the FOIA. See pp. 5 – 11 and Appendix of the Alliance's comments, Docket 12150, Entry 10 (July 1, 2002). The vast majority of the Alliance's comments were devoted to this classic FOIA-based justification for its position.

To this extent, the Alliance and Public Citizen are in agreement that NHTSA should apply conventional FOIA/Exemption 4 principles to the decision as to whether certain "early warning" information is entitled to protection from disclosure. Moreover, the Alliance and Public Citizen are in agreement that "class determinations are an invaluable tool for effective use of the early warning reporting system," (PC Comments, page 7), although we probably differ on the application of that "invaluable tool." The Alliance submits that it has provided substantial legal and factual justification for the competitive harm that would be suffered if certain "early warning" submissions were routinely disclosed to the public, particularly the compendium of quality and customer satisfaction information that will be represented by the submission of comprehensive consumer complaints and warranty claim data. From the standpoint of efficient use of NHTSA's resources, as well as those of submitting manufacturers, it makes eminent sense to implement the "invaluable tool" of class determinations to presumptively protect those portions of submissions that contain information that would be competitively harmful if released, thereby relieving the manufacturers and the agency from the burden of considering repetitive submissions of Part 512 justifications for information that has been found to be presumptively confidential.

The Alliance also agrees, for the most part, with Public Citizen's analysis of the "likely order of events pertaining to submissions" (PC Comments P. 8), showing that the disclosure analysis under Section 30166(m)(4)(C) occurs after a FOIA-based determination of eligibility for protection as confidential business information. However, we strenuously disagree that the category of information affected by the existence of Section 30166(m)(4)(c) is "minuscule." PC Comments at p. 9. The Alliance submits that a substantial amount of information submitted by the manufacturers as "early warning" data will be competitively harmful if released, and therefore entitled to protection under Exemption 4 of FOIA, either as a class determination or after individualized submissions each quarter, should NHTSA not create the class determinations for the eligible information.

For reasons explained more fully in the Alliance's July 1 comments, including the well-established doctrine that a new provision of a statute should not be construed as surplusage or meaningless, we think that the statutory structure of Section 30166(m)(4)(c), and "the likely order of events pertaining to submissions" both strongly support the Alliance's conclusion that Congress itself expected substantial amounts of the "early warning" submissions to be confidential under FOIA, and therefore concluded that it was necessary to neutralize the post-FOIA presumption of disclosure contained in existing Section 30167(b). The Alliance's reading of this text and structure is the most natural way to understand what Congress was doing in enacting this provision, gives a reasonable meaning to the provision that would otherwise be essentially surplusage, and generally harmonizes with the agency's contemporaneous interpretation of the meaning of the section.

The Alliance urges NHTSA to give no weight to Public Citizen's argument that an undocumented telephone call between the staff of a single Member of Congress and the staff of NHTSA's Chief Counsel should somehow establish legislative history in favor of disclosure of information that would otherwise be entitled to confidential treatment under FOIA. (PC Comment, p. 2).

For reasons discussed above, the summary of the undocumented communication in the Public Citizen comment, the underlying details of which can not be independently verified[2], does not even address the question of whether the "early warning" submissions that are required by NHTSA's July 10, 2002 final rule would be entitled to protection under Exemption 4, nor could the conversation have done so. With the exception of fatalities, serious injuries and foreign recalls/safety campaigns, the TREAD Act did not mandate the collection of any other non-aggregated categories of reportable data. NHTSA added those specific categories (such as consumer complaints) after eighteen months of rulemaking. Because those specific categories were not proposed until January 2001, and not finally decided upon until July 2002, they could not have been addressed or even reasonably anticipated in any conversation in October 2000 about the agency's intention to protect or disclose "early warning" information, beyond fatalities, serious injuries and foreign recalls/safety campaigns.

Likewise, the colloquy between Chairman Tauzin and Representative Markey on the floor of the House of Representatives regarding the meaning of Section 30166(m)(4)(C) provides no support for Public Citizen's view that Congress intended to eviscerate the protection available under Exemption Four for confidential business information. To the contrary, it supports the Alliance's view that Congress intended traditional FOIA principles to govern the decisions as to which "early warning" information will be subject to public disclosure and which will be entitled to protection as confidential business information. Particularly given NHTSA's longstanding practice of automatically releasing information about customer complaints to manufacturers,

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[2] Even in instances where written documentation exists, Public Citizen fails to present an accurate synopsis. Elsewhere in the Public Citizen comments, a short excerpt of a deposition of Mr. Jack Cline, an employee of Value Rent-A-Car, is provided to, "underscore the real and continuing cost of the information chasm". Yet Public Citizen withholds from its comments related testimony regarding the credibility of Mr. Cline creating its own information chasm. The following is an excerpt from the testimony of Mr. John Mavis, counsel for Ford, regarding his discussion with Mr. Cline:

Question by Mr. Ed Lowther: Now, I want to take you back to a conversation that you had with Jack Cline at Value Rent-A-Car. Do you recall that conversation, that meeting?
Answer of Mr. John Mavis: Yes, I do.
Question: Mr. Cline has testified in this case, and he has testified that at that meeting, the two of you discussed issues relating to the strength of the roof in the Aerostar van. Did you, sir?
Answer: No
Question: Mr. Cline has testified that during the course of his conversation with you, he discussed in your presence the issue of recalling the Aerostar van. Did that conversation take place?
Answer: No, it didn't.
Question: Mr. Cline has also testified that during the course of this conversation with you, that you said, quote, "Ford would not recall the minivan. It would be cheaper to pay the claims involving the Aerostar." Did you say that to him, sir?
Answer: That's an absolute lie. I never said anything like that to anybody in my life.

The trial judge had this to say of Mr. Cline's credibility:

"Now, my own personal opinion is Mr. Cline's credibility is about as minimal as you can get, but that's not my decision to make. That's the jury's decision. I mean, the things that Mr. Cline said in this courtroom as opposed to what he said in his deposition, the whole circumstances of his obvious dishonesty with his employer about his job, all those sort of things. But still the credibility is to be weighed. I can't say as a matter of law that the jury cannot choose to believe Mr. Cline."

warranty claims, etc., ***only after*** the opening of a defect (or noncompliance) investigation, and the well-established doctrine that Congress is presumed to be ratifying agency practices when it legislates in the same subject area, the colloquy's conclusion that Section 30166(m)(4)(C) should not change current disclosure practice is neither surprising nor inconsistent with the Alliance' s position.

As to the latter point, on ratification of agency practices, Public Citizen dismisses that long-standing canon of statutory construction as "inapplicable" to the TREAD Act, without any case law or legislative history to support that position. Of course, the canon of construction is "applicable" to the TREAD Act, as it is to any statute, and Public Citizen has offered no coherent reason why it should not be.

Public Citizen's dismissal of the Alliance's citation of Attorney General Ashcroft's October 12, 2001 policy memorandum on FOIA as "bootstrapping" reflects Public Citizen's pervasive misunderstanding of the Alliance position. Contrary to Public Citizen's accusation, the Alliance comments did, in fact, "concern agency practices under FOIA," and provided extensive support for the position that some of the "early warning" information is entitled to protection under conventional Exemption Four analysis.

Finally, Public Citizen's attack on the Alliance's competitive harm arguments is seriously flawed, and inconsistent with applicable FOIA case law. Without providing a line-by-line rebuttal in the interest of keeping these comments brief and without suggesting that the Alliance concedes any of the positions taken by Public Citizen that are unrebutted here, we will highlight one egregious example. Public Citizen characterizes as "novel" and "unwise" the argument that a compendium of information may be entitled to protection, even if the individual units of information within that compendium would not all be protected under Exemption Four principles. Public Citizen acknowledges, as it must, that the D.C. Circuit and the D.C. District Court reached just such a conclusion in two Customs Service cases, but argues that those cases are somehow distinguishable as limited to facts regarding Customs Service documents. What Public Citizen does not acknowledge, but which proves the weakness of Public Citizen's position, is the fact that the Customs Service cases troubling Public Citizen have been noted as authoritative precedent in other cases unrelated to the Customs Service, including specifically a case involving information resident at NHTSA. See ***Center for Auto Safety v. NHTSA***, 93 F.Supp.2d 1, 27-28 (DDC 2000). See also ***Public Citizen Health Research Group v. NIH***, 209 F.Supp.2d 37, 48-49 (DDC 2002).

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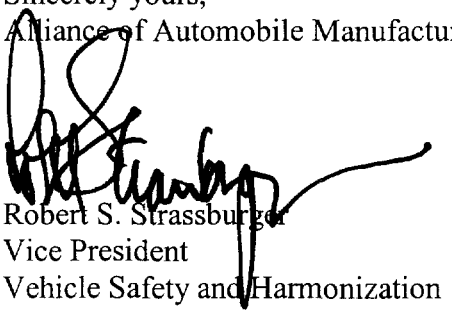
The Alliance appreciates this opportunity to provide supplemental comments on the significant issues associated with protecting confidential business information.

Sincerely yours,
Alliance of Automobile Manufacturers, Inc.



Robert S. Strassburger
Vice President
Vehicle Safety and Harmonization

cc: Jacqueline S. Glassman, Esq.
Chief Counsel

Docket Management, Room PL – 401

Desk Officer for NHTSA, U.S. Office of Management and Budget
Office of Information and Regulatory Affairs